# In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1703

ARTHUR TORTORELLO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

Petitioner raises issues concerning the use against him of evidence obtained from court authorized oral and wire interceptions conducted pursuant to state and federal statutes. He claims that the use in evidence of recordings of conversations from the state interception, authorized to obtain evidence of state offenses, was illegal because federal agents participated in part of the interception. He also asserts that the state and federal electronic eavesdropping statutes are unconstitutional and challenges the interception on the basis of its duration and scope and the sufficiency of the showing of probable cause.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of the sale of unregistered securities in violation of 15 U.S.C. 77e(a)(1), (2); two

counts of fraud in violation of 15 U.S.C. 77q(a); one count of mail fraud in violation of 18 U.S.C. 1341; and one count of conspiring to commit the above offenses in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of five years' imprisonment on each count and fined $10,000. The court of appeals affirmed in a lengthy opinion (Pet. App. 1a-35a).

The evidence summarized by the court of appeals showed that petitioner and others participated in a scheme to sell worthless securities of a defunct Texas corporation which they had resurrected and whose assets they misrepresented (Pet. App. 3a-4a). The government's evidence at trial depended primarily on conversations obtained by wire and oral interceptions conducted by the New York District Attorney's office under a New York State court order, issued pursuant to the New York electronic interception statute (N.Y. Crim. Pro. L., Art. 700).[1] An original order and five extensions authorized interception for 149 days of wire communications on two telephones at petitioner's office ("Todd Associates") and the installation of overhearing devices on the premises for the same time. They were based on findings of probable cause that petitioner Tortorello and others were committing offenses involving burglary, forgery, grand larceny and other state offenses and conspiring to commit these offenses (Pet. App. 5a, 22a). It was also shown that petitioner was a "fence" for stolen property, particularly stolen securities (Pet. App. 22a).

---

[1] The statute was adopted subsequent to the enactment of the federal statute, 18 U.S.C. 2510-2520 (Title III, Omnibus Crime Control and Safe Streets Act of 1968) and pursuant to the provisions of that statute (18 U.S.C. 2516(2)). It virtually tracks the language of the federal statue; the primary difference is the list of crimes for which interception orders may issue.

1. We rely on the opinions below for the answers to petitioner's claims concerning the duration and scope of the interception (Pet. App. 10a-11a, 21a-26a, 31a-35a, 55a); the sufficiency of the showing of probable cause (Pet. App. 13a-16a, 53a-55a); and the constitutionality of the state and federal statutes (Pet. App. 6a-13a).[2]

2. During the course of the state interception of "Todd Associates," state officers inadvertently overheard conversations regarding the stock fraud upon which this indictment was based. They notified federal officers who thereafter participated in the interception (Pet. App. 5a-6a). Petitioner claims that the interception must therefore be considered a federal interception, and that, since the crimes for which he was indicted and convicted are not listed in 18 U.S.C. 2516(1) as ones for which a federal electronic interception order may issue, the interception was illegal and the evidence derived therefrom should have been suppressed.

This claim is both untimely and without merit. It was raised for the first time in the court of appeals at oral argument, and that court did not decide it (Pet. 6). No reason is advanced for this untimeliness; this Court therefore should not consider the issue. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16.

Since the issue was not timely raised, no record was made to indicate the length or extent of participation by federal agents. But even if we assume *arguendo*

---

[2] The cases supporting the constitutionality of the federal statute are collected at Pet. App. 12a-13a, n. 5. Certiorari was denied in *United States* v. *Whitaker*, 474 F. 2d 1246 (C.A. 3), on June 18, 1973 (Nos. 72-1317 and 72-1467).

that the interception may properly be characterized as a federal investigation under this Court's decisions in *Lustig* v. *United States*, 338 U.S. 74, and *Byars* v. *United States*, 273 U.S. 28, petitioner's claim that the evidence was illegally obtained and must be suppressed is without merit.

Petitioner bases his argument that the warrant was not issued in compliance with federal law on the erroneous contention that a federal warrant could not have been issued on the facts shown. But the affidavit submitted to the state court showed probable cause to believe that petitioner was engaged in interstate "fencing" of stolen goods and securities, which would constitute violations of 18 U.S.C. 2314 and 2315. These are offenses for which federal interception orders may issue.

Since the original interceptions were properly authorized, the initial interception of the conversations regarding the stock fraud by the state officers was also proper. Both the state and federal statutes specifically authorize the interception of communications concerning offenses not listed in the court order authorizing interception and their use in evidence. See, 18 U.S.C. 2517(5); N.Y. Code of Crim. P. §825.4 (now N. Y. Crim. Pro. L., Section 700.65).[3]

There was likewise no impropriety in the decision to share the information which was discovered concerning federal offenses with federal authorities. Such cooperation is specifically authorized by the federal statute. 18 U.S.C. 2517(1) provides for disclosure of information

---

[3] However, since the securities fraud here constituted grand larceny under New York statutes, the interception of these communications by the state officers was in fact within the scope of their state court order (Pet. App. 27a-30a).

between law enforcement officers in the performance of their duties. In enacting this Section, Congress contemplated close cooperation between federal, state and local officers. S. Rep. No. 1097, 90th Cong., 2d Sess., 99. The only limitations the statute places on this sharing of information are that the disclosing officers must have obtained the information by means authorized by the statute and that the disclosure must be "appropriate to the proper performance of the official duties of the officer making or receiving the disclosure" (18 U.S.C. 2517(1)). There is no requirement that the information must relate to an offense designated in 18 U.S.C. 2516(1), nor is there any indication that such disclosure can be made only after termination of the interception. In this case, the state officers did intercept these conversations pursuant to a lawful authorization, and the disclosure was appropriate to the performance of the official duties of both the state officers in sharing the information[4] and the federal officers in their investigation of federal crimes. For the foregoing reasons, petitioner's analogy to the "silver platter doctrine" is inapt. The interception here by the state authorities was both lawful and constitutional. Nor is it open to question that disclosure of this lawfully obtained information to federal officers was authorized by the federal and state statutes. The fact that the disclosure was made at the time of the interception, rather than after the interception was completed,

---

[4] Since the conversations were properly intercepted by the state officers searching for evidence of crimes against state statutes, there is nothing in the record to support the claim that this interception was conducted as a subterfuge to permit the federal officers to obtain otherwise unavailable evidence. Cf. *Abel* v. *United States*, 362 U.S. 217, 225-230.

makes no differnce in these circumstances. Cases cited by petitioner involving unlawful or unconstitutional searches by state officers are inapposite. So are the cases in which participation by federal officers in a state search rendered evidence inadmissible in a federal trial for failure to comply with the standards of Rule 41, Fed. R. Crim. P.

For the reasons stated above and in the opinions below, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

AUGUST 1973.